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In the Supreme Court of the United States

OCTOBER TERM, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

AMERICAN HOSPITAL ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Despite respondents' numerous diversions, this case presents a straightforward issue of statutory construction: whether Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, prohibits a federally funded hospital from withholding nourishment or medical treatment from a handicapped infant—or otherwise discriminating against the infant in the administration of its federally funded programs and activities—solely because of his handicap. The court of appeals held that Section 504 furnishes no protection to such an infant, and it therefore invalidated on their face the interpretative guidelines and regulations that the Secretary promulgated to give meaning and effect to Section 504 in this setting. The only question before this Court is whether that sweeping ruling by the court of appeals was correct. The application of Section 504 to any particular withholding of medical treatment is not presented here.

We have demonstrated in our opening brief that the language of Section 504 clearly prohibits a federally as-

sisted hospital from withholding nourishment or medical treatment from a handicapped infant solely because of his handicap. See Pet. Br. 16-28. We have further demonstrated that there is firm support for this interpretation at every stage in the evolution of Section 504—from its roots in Title VI of the Civil Rights Act of 1964, through its enactment in 1973, the amendments passed by Congress in 1974 and 1978, and the consistent administrative construction. See Pet. Br. 29-46.

Respondents American Medical Association, et al. (AMA), make essentially no effort to answer our arguments based on the text, legislative history, and administrative interpretation of Section 504. Moreover, by its own admission (AMA Br. 14-15 n.19), the AMA does not attempt to defend the legal reasoning of the court of appeals in striking down the interpretative guidelines and regulations on their face. The AMA instead devotes its brief primarily to two other matters that it believes would nevertheless support affirmance of the judgment below: the role of the parents in decisions concerning the furnishing of medical treatment to a child, and the duty of a hospital under state law to report suspected instances of medical neglect where the parents withhold their consent to such treatment. However, these issues are beside the point in this case, which concerns the role of the hospital, not the parents, and concerns the hospital's duty of non-discrimination under federal law, whether or not it complies with reporting obligations under state law.

By contrast, respondents American Hospital Association, et al. (AHA), do attempt to defend the court of appeals' broad holding, but to no avail. The AHA distorts the plain meaning of each of the statutory terms upon which it seizes in an effort to find some support for its resistance to the non-discrimination principle of Section 504, and the AHA fails to address those aspects of the legislative history and administrative interpretation of Section 504 that clearly establish its application to medical treatment decisions. But because the AHA does address at least some of the factors bearing on the ques-

tion of statutory construction presented in this case, we shall address its arguments first.

A. 1. The AHA first maintains (AHA Br. 17-18) that an infant born with severe impairments is not a "handicapped individual" for purposes of Section 504. Even the court of appeals rejected that contention (see Pet. App. 26a-28a), and with good reason. The term "handicapped individual" is defined to mean "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. 706(7)(B). The AHA concedes (AHA Br. 18) that seriously ill infants have significant "physical or mental impairments" within the meaning of this definition, but it takes the position that these impairments are not relevant to "major life activities." This argument ignores reality.

The term "major life activities" is defined by HHS regulations first promulgated in 1977—the validity of which the AHA does not question—to mean "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. 84.3(j)(2)(ii). The AHA is wrong in arguing (AHA Br. 18) that this definition is concerned only with a person's ability to benefit from programs of education, employment, and independent living, and therefore does not apply to newborn infants. The illustrative list in the regulation refers to some functions (*e.g.*, seeing, hearing, breathing, and learning) that are relevant to *all* aspects of human existence, including that of infants (J.A. 61). The AHA's apparent argument to the contrary—that Section 504 is limited to adults and to children who have attained an age at which they are able to benefit from formal education—is refuted by the language of 29 U.S.C. 706(7)(B), which defines the term "handicapped individual" broadly to mean "*any* person," without limitation based on age. Moreover, this Court has stressed that Section 504 "protects handicapped persons of all ages." *Smith* v. *Robinson*, No. 82-2120 (July 5, 1984), slip op. 23.

2. The AHA argues (AHA Br. 18-20), however, that even if an impaired infant is a "handicapped individual," he is not "otherwise qualified," within the meaning of Section 504, to receive medical treatment from a federally assisted hospital. In the AHA's view, the term "otherwise qualified" means that in order for the non-discrimination requirement in Section 504 to apply, the individual's handicap must be an "irrelevancy," such that he has "essentially the same basic capabilities necessary for achievement in the same undertaking" as does a non-handicapped individual (AHA Br. 19). This argument fundamentally misapprehends the thrust of Section 504.

As this Court has held, an "otherwise qualified" handicapped individual is "one who is able to meet all of a program's requirements in spite of his handicap." *Southeastern Community College* v. *Davis*, 442 U.S. 397, 406 (1979). The term thus refers to a person who satisfies whatever reasonably necessary and bona fide standards of general applicability are adopted by the federally funded program. Contrary to the AHA's contention, there is no additional prerequisite in Section 504 itself that the individual's handicap must be altogether irrelevant or that he have the same "basic capabilities" and potential for achieving a particular result as a non-handicapped person. See 45 C.F.R. 84.4(b)(2); *Alexander* v. *Choate*, No. 83-727 (Jan. 9, 1985), slip op. 16.

This interpretation is strongly supported by the legislative history of Section 504. The bills introduced in the 92d Congress, after which Section 504 was patterned (*Alexander* v. *Choate*, slip op. 7-8 n.13), would have amended Title VI of the Civil Rights Act of 1964 to bar discrimination against a person on the basis of handicap "unless lack of such physical or mental handicap is a bona fide qualification reasonably necessary to the normal operation of such program or activity." S. 3044, 92d Cong., 2d Sess. (1972); 118 Cong. Rec. 526 (1972); see 118 Cong. Rec. 2999 (1972) (remarks of Rep. Vanik). See also 124 Cong. Rec. 30323-30324, 37509-37510 (1978) (remarks of Sen. Williams). This provision obviously is

the source of the term "otherwise qualified" in Section 504 as eventually enacted. The AHA does not suggest that the lack of the handicaps experienced by the infants who are protected by the guidelines and regulations at issue here is in all instances "a bona fide qualification reasonably necessary to the normal operation" of a federally assisted hospital program. Nor could it plausibly do so. Indeed, the AMA baldly asserts (AMA Br. 40) that a hospital would *never* decline to furnish medically indicated treatment to a handicapped infant where the parents have given their consent, and a necessary premise of that assertion is that the hospitals concerned do regard such an infant as "otherwise qualified" for medical treatment. At the very least there is no basis for the AHA's argument that *all* such infants are categorically excluded from the coverage of Section 504 because they are not "otherwise qualified" to receive the medical benefits of the federally assisted health program.

3. a. In an effort to avoid entirely any prohibition against discrimination, the AHA next argues (AHA Br. 21-25) that a hospital does not receive the sort of "federal financial assistance" that triggers the application of Section 504. However, this issue cannot be resolved in the context of this broad challenge to the interpretative guidelines and regulations on their face. The guidelines and regulations do not even address the question of what constitutes a program or activity receiving federal financial assistance for purposes of Section 504. Moreover, neither court below considered whether, as a general matter, hospitals have programs or activities that make Section 504 applicable in this setting, because both courts concluded that Section 504 has no application to medical treatment decisions affecting handicapped infants even in a program that receives federal financial assistance. For these reasons, whether any particular hospital receives federal financial assistance within the meaning of Section 504 would more appropriately be considered in the context of the application of Section 504 to a medical treatment decision made in that institution. See Pet. App. 16a-18a; *United States* v. *Baylor University Medical*

Center, 736 F.2d 1039, 1041 n.2 (5th Cir. 1984), cert. denied, No. 84-525 (Jan. 21, 1985).

b. In any event, the AHA's broad argument that Section 504 could never apply to the treatment of handicapped infants because, as a matter of law, a hospital never receives "federal financial assistance" that triggers its application in this setting was fully considered and correctly rejected by the Secretary when the guidelines and regulations were promulgated (J.A. 69-75). It is important to stress that the AHA's argument apparently also would render Title VI of the Civil Rights Act of 1964 largely inapplicable to federally funded hospital programs, despite their receipt of approximately $48 billion annually under the Medicare and Medicaid programs (J.A. 72). Yet the legislative history of the Civil Rights Act of 1964 establishes that Title VI was intended to apply to the predecessor of the Medicaid Program (110 Cong. Rec. 13132 (1964) (#41); *id.* at 1661 (remarks of Rep. Lindsay, et al.)), and the 1965 amendments to the Social Security Act in which the Medicare and Medicaid programs were enacted make clear that Congress intended that Title VI would apply to hospitals that receive financial assistance under those programs (111 Cong. Rec. 15803 (1965) (remarks of Sen. Ribicoff); *id.* at 15813 (remarks of Sens. Hart and Pastore)). See Pet. Br. 30-31; *Baylor University Medical Center*, 736 F.2d at 1044-1046.

Moreover, prior to the enactment of Section 504 in 1973, the Secretary had promulgated regulations making clear that Title VI prohibits discrimination on the basis of race in the admission and treatment of patients in federally funded health programs (45 C.F.R. 80.4(d)(2) and 80.5(a) (1966)) and that Medicaid and Medicare are to be regarded as federal financial assistance for these purposes (45 C.F.R. Pt. 80, App. A, pt. 1 para. 121 and pt. 2 para. 30, as added by 38 Fed. Reg. 17984 (July 5, 1973)). Because Congress patterned Section 504 after Title VI (see Pet. Br. 30, 35-36), Congress must be presumed to have intended that Medicare and

Medicaid would constitute federal financial assistance under Section 504 as well. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 694-698 (1979); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).

When the regulations implementing Section 504 were promulgated in 1977, the Secretary again took the position that the Medicaid and Part A Medicare programs constitute federal financial assistance for these purposes (see 45 C.F.R. Pt. 84, App. A, paras. 1 and 2), and the legislative history of the 1978 amendments to the Rehabilitation Act confirms the correctness of that interpretation (124 Cong. Rec. 30325 (1978) (remarks of Sen. Hathaway)). See also H.R. Rep. 98-442, 98th Cong., 1st Sess. 77 (1983). Nor did this Court in *Alexander* v. *Choate* question the applicability of Section 504 to the furnishing of services under Medicaid. Against this background, there is no merit whatever to the AHA's argument (AHA Br. 21-22) that the interpretative guidelines and implementing regulations at issue here are invalid on their face because Medicare and Medicaid cannot, as a matter of law, constitute federal financial assistance.[1]

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[1] Several related arguments by the AHA warrant a brief response. The AHA asserts (AHA Br. 23) that the receipt of Medicare funds does not trigger the application of Section 504 because Medicare funds are paid only on behalf of the aged and disabled, not infants. This argument is premised on the view that the relevant "program" for purposes of Section 504 is confined to those particular subparts of the hospital's inpatient operations in which specific Medicare patients are housed, rather than the inpatient operations as a whole. But see *Baylor University Medical Center*, 736 F.2d at 1041 n.2, 1050. But even if only subparts of the hospital's inpatient operations are covered, the receipt of Medicaid funds for services rendered in the subpart in which impaired infants are treated would make Section 504 applicable.

The AHA also asserts (AHA Br. 23-24) that the application of Section 504 to the discriminatory withholding of medical treatment from a handicapped infant would be inconsistent with 42 U.S.C. 1395, which provides that nothing in the Medicare Act shall be construed to authorize any federal officer "to exercise any supervision or control over the practice of medicine" or over the administration of any institution furnishing health services. See also

4. The AHA also contends (AHA Br. 28-31) that the denial of nourishment or needed medical treatment to a handicapped child cannot, as a matter of law, constitute "discrimination" within the meaning of Section 504. Embracing the view of the court of appeals in the *University Hospital* case, the AHA argues that "[w]here the handicapping condition is related to the condition(s) to be treated, it will rarely, if ever, be possible to say with certainty that a particular decision was 'discriminatory'" (AHA Br. 29, quoting Pet. App. 30a).

AMA Br. 39 n.48. This argument is without merit for two reasons. First, by its terms, 42 U.S.C. 1395 refers only to the Medicare Act; it does not apply to the exercise of authority under other statutes, such as Title VI or Section 504, that impose duties of nondiscrimination in the furnishing of medical care. Second, 42 U.S.C. 1395 does not prohibit the scrutiny of medical services even in the administration of the Medicare program—*e.g.*, to determine whether services for which reimbursement is sought were reasonable and necessary. See *Szekely* v. *Florida Medical Association*, 517 F.2d 345 (5th Cir. 1975), cert. denied, 425 U.S. 960 (1976).

Finally, the AHA's argument (AHA Br. 26-28) that Section 504 can never apply in this setting because hospitals do not actually make treatment decisions in particular cases is without merit. In the first place, Section 504 requires the hospital to respond in a non-discriminatory manner when it learns of a withholding of necessary medical treatment for a handicapped infant who is a patient in the hospital, even if it exercises no control over the actions of physicians to whom it has granted staff privileges. In any event, hospitals have the authority to insist that physicians who are granted staff privileges adhere to medical and ethical standards. See *Lew* v. *Kona Hospital*, 754 F.2d 1420, 1424 (9th Cir. 1985); *Truly* v. *Madison General Hospital*, 673 F.2d 763, 765 (5th Cir.), cert. denied, 459 U.S. 909 (1982); *Sosa* v. *Board of Managers of Val Verde Memorial Hospital*, 437 F.2d 173 (5th Cir. 1971). In fact, the Medicare regulations require that the hospital have an organized medical staff that is "responsible to the governing body of the hospital for the quality of all medical care provided patients in the hospital and for the ethical and professional practices of its members" (42 C.F.R. 405.1023). See also 42 C.F.R. 405.1021. The Secretary's Section 504 regulations also make clear that the recipient of federal financial assistance is prohibited from discriminating on the basis of handicap "through contractual, licensing, or other arrangements" and from aiding discrimination practiced by others. 45 C.F.R. 84.4(b)(1) and (v), 84.5(a). See J.A. 64-66.

This argument is seriously flawed in two critical respects. First, it wholly ignores the not infrequent situation in which the handicapping condition is not inextricably related to the condition for which a particular course of treatment is otherwise indicated. For example, in the case of a child who has Down's Syndrome and a blocked esophagus, the presence of the handicapping condition (Down's Syndrome) does not suggest that surgery to correct the blocked esophagus is contraindicated as a medical matter. Cf. *Guardianship of Philip B.*, 139 Cal. App. 3d 407, 188 Cal. Rptr. 781 (1983).[2]

Second, the AHA's argument ignores the fact that the non-discrimination principle embodied in Section 504 is not rendered nugatory simply because several conditions may be interrelated and must be treated in a coordinated fashion. As the Secretary explained when the guidelines were promulgated, the same analytical framework applies in such a case: the "handicap" is the physical or mental impairment that would remain *after* completion of the treatment for a particular aspect of the infant's condition, and the provider may not withhold that treatment solely because the infant would have that handicap after the treatment was completed (J.A. 62-64).

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[2] The AHA relies (AHA Br. 29) on recent testimony before the Civil Rights Commission. However, in those hearings, the Surgeon General upon whose testimony the AHA relies (AHA Br. 29, 30), made clear that the AHA's example of inextricably interrelated impairments does not describe the actual circumstances in all cases. He stated that if the esophegal problem in the Bloomington child had been present in a child who did not have Down's Syndrome, it "would have been corrected surgically and would have likely had about a 95 percent success rate. But when the two [Down's Syndrome and esophegal atresia] exist together, it provides an opportunity for one to influence the treatment of the other, and hence the initial concern that children who were so treated were, in a sense, having their civil rights violated." *Protection of Handicapped Newborns: Hearings Before the United States Commission on Civil Rights* 8 (June 12, 1985).

It may be that in certain cases involving several interrelated medical problems, there will be a relatively broad range of reasonable medical judgments that might be made regarding what (if any) treatment should be afforded to the infant. The interpretative guidelines at issue here do not intrude the Secretary into these complex medical judgments. Section 504 instead states a single guiding principle that may readily be borne in mind by the hospital, treating physicians and other responsible personnel: the decision whether or how to treat a handicapped infant must be based on a bona fide medical judgment regarding the risks and benefits to the infant, and not on the mere fact that he is handicapped and may remain so after the treatment. Section 504 therefore does nothing more than require that medical professionals actually exercise the same sort of medical judgment on behalf of their patients who are handicapped infants that, as the AHA and AMA concede (AHA Br. 31; AMA Br. 6, 40, 46), they are legally and ethically bound to exercise on behalf of their patients who are not handicapped. Compare *Youngberg* v. *Romeo*, 457 U.S. 307, 323 (1982). The Secretary has repeatedly made clear that such bona fide medical judgments by medical professionals will be respected (J.A. 12-13, 19, 41).

5. As we have shown above and in our opening brief (at 18-28), the language of Section 504 clearly prohibits a federally assisted hospital program from denying a handicapped infant nourishment, medical treatment, or other benefits solely because of his handicap. That language must control "[a]bsent a clearly expressed legislative intention to the contrary" (*Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). The AHA's discussion of the legislative history of Section 504 (AHA Br. 32-40) fails to identify *any* indication of a contrary congressional intention.

a. The AHA first ignores both the legislative history of Title VI, which manifests a clear intent to prohibit

"[d]iscriminatory treatment of patients" in federally assisted hospitals (110 Cong. Rec. 6546 (1964) (remarks of Sen. Humphrey)), and the Title VI regulations, which from the outset have prohibited discrimination on the basis of race with respect to "admission *or* other treatment of individuals as * * * patients" (45 C.F.R. 80.4 (d) (2) (emphasis added)). See Pet. Br. 30-31. Against this background, it is clear that Title VI prohibits racial discrimination not only in the admissions policies of hospitals, as the AHA suggests (AHA Br. 33), but also in the subsequent furnishing of medical treatment to patients who were initially admitted on a non-discriminatory basis.

The AHA concedes (AHA Br. 31-32 n.32), as does the AMA (AMA Br. 42, 43 n.55), that Section 504 bars a hospital from discriminating in connection with the admission of patients in a federally assisted health services program—*i.e.*, in providing "access" to such a program. Because Section 504 was patterned after Title VI, it follows, if this much is conceded, that Section 504 likewise must be construed to require the "even-handed treatment" (*Alexander* v. *Choate*, slip op. 16) of a handicapped infant after he has been admitted to the hospital. The text of Section 504 compels that conclusion: it provides that an otherwise qualified handicapped individual shall not, solely by reason of his handicap, "be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Although the first of these three phrases might prohibit discrimination only in a hospital's admission of patients to a hospital's federally assisted programs (and similar matters of "access"), the latter two phrases plainly prohibit discrimination in the hospital's furnishing of medical services to infants who have been admitted. Moreover, as the Secretary explained in promulgating the regulations, "it is an anomalous and bizarre theory that section 504 can properly be used to require that a ramp be built in a hospital to assure that

handicapped persons not be denied access to medical services solely on the basis of their handicaps, but that statute may not properly be used to prevent the intentional act of allowing other handicapped persons to die in that hospital, solely because of their handicaps" (J.A. 62).

b. The AHA's efforts (AHA Br. 34-38) to find specific support in the legislative history of Section 504 for an implied exemption for medical treatment decisions also is without merit. Contrary to the AHA's assertion (AHA Br. 34-36) that Senator Humphrey was concerned only with educational opportunities for handicapped children, the Senator stated that "[e]very child—gifted, normal and handicapped—has a fundamental right to educational opportunity *and* the right to health" (118 Cong. Rec. 526 (1972) (emphasis added)). Further, as the AHA concedes (AHA Br. 36-37 & n.39), Senator Percy linked the predecessor to Section 504 to a Senate Resolution that called for a declaration of rights of the handicapped, including the "right to proper medical care" (S. Con. Res. 92 Cong., 1st Sess. (1971); 117 Cong. Rec. 42294 (1971)). See 118 Cong. Rec. 526, 11789 (1972) (remarks of Sen. Percy).[3]

c. The AHA wholly ignores the legislative history of the 1974 amendment of the term "handicapped individual" that unambiguously demonstrates a congressional intent to establish a "broad governmental policy" against dis-

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[3] The AHA also takes issue (AHA Br. 38 n.43) with our quotation of Representative Vanik's reference to the practice of the ancient Spartans of leaving a "handicapped newborn * * * to die of exposure on the mountainside" and his rhetorical question: "Are we guilty of the same type of gross neglect in this country?" (119 Cong. Rec. 18137 (1973)). The AHA attempts to discount the relevance of this comment because it was made in connection with an objection to the elimination of certain provisions for educational assistance for handicapped children. The AHA misses the point. Representative Vanik obviously found the Spartan's treatment of handicapped newborns abhorrent. It is reasonable to assume that he also would have found abhorrent any comparable modern-day practice, such as allowing a handicapped newborn to die in a hospital as a result of the denial of necessary medical treatment.

crimination in federally assisted programs (S. Rep. 93-1297, 93d Cong., 2d Sess. 39 (1974)); that the programs Congress had in mind specifically included those furnishing "health services" (*id.* at 38); that discrimination on the basis of handicap should be regarded as "similar to discrimination because of race" (*ibid.*); and that the Secretary should issue regulations to implement Section 504 (*id.* at 39-40). As we have explained (Pet. Br. 35-36), each of these aspects of the 1974 legislative history strongly supports the Secretary's interpretation of Section 504 as barring discrimination on the basis of handicap in the furnishing of medical services to handicapped infants, just as Title VI bars discrimination on the basis of race in the furnishing of medical services. At the very least, this legislative history does not furnish affirmative support for the AHA's argument (AHA Br. 38 & n.44) that Section 504 should be construed, contrary to its plain language, to bar discrimination only in "access" to federally assisted programs.[4]

The AHA also ignores the obvious significance of Congress's parallel enactment in 1974 of the prohibition against discriminatory treatment of alcoholics by a hospital. See Pet. Br. 38-40. Contrary to the AHA's suggestion elsewhere in its brief (AHA Br. 25-26 n.25, 40 n.46), this prohibition is not limited to discrimination in the admission of patients. The statutory provision explicitly bars discrimination in "admission *or* treatment" (Pub. L. No. 93-282, § 121(a), 88 Stat. 130; 42 U.S.C. (Supp. I) 290dd-2(a) (emphasis added)). See also S. Rep. 93-208, 93d Cong., 1st Sess. 14 (1973).

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[4] The AHA relies on the example in the 1974 Senate Report of "handicapped persons who may be denied admission to Federally-assisted nursing homes on the basis of their handicap" (S. Rep. 93-1297, *supra*, at 38). See also AMA Br. 43 n.55. However, this example in no way suggests an affirmative intent by Congress to allow a federally assisted nursing home or other provider of health services to withhold necessary medical or other services from an otherwise qualified handicapped person who already had been admitted to its care. See *Jefferson County Pharmaceutical Ass'n* v. *Abbott Laboratories*, 460 U.S. 150, 159 n.18 (1983).

d. Finally, the AHA concedes (AHA Br. 40 & n.46) that the Section 504 regulations promulgated by the Secretary in 1977 barred discrimination in the furnishing of medical treatment as a general matter; specifically prohibited discrimination by federally assisted hospitals in the admission and "treatment" of alcoholics and drug addicts; and discussed the Attorney General's opinion concluding that Section 504 prohibits discrimination in medical treatment. See Pet. Br. 40-42; 45 C.F.R. 84.51 and 84.53; *id.* Pt. 84, App. A, paras. 4, 36, 37. The AHA argues (AHA Br. 40 & n.46), however, that Congress's enactment of the 1978 amendments to the Rehabilitation Act cannot be viewed as an endorsement of this administrative interpretation. The AHA is wrong for two reasons.

First, contrary to the AHA's assertion, this Court in *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624 (1984), read the 1978 amendments to reflect approval not only of the procedural provisions of the Section 504 regulations, but also their substantive provisions—including those involved in *Darrone* itself that barred discrimination in employment regardless of the primary objective of the federal financial assistance. See 465 U.S. at 634-635 & nn. 14-16. Second, as we have explained (Pet. Br. 42-43), the legislative history of the 1978 amendments shows a clear congressional awareness and general endorsement of the views of the Secretary and the Attorney General and an understanding that Section 504 bars discrimination in the furnishing of health services by hospitals and other providers.

B. 1. The AMA, in contrast to the AHA, makes essentially no effort to respond to our arguments based on the text and legislative history of Section 504 or to defend the court of appeals' reasoning in creating an implied exception from Section 504 for discrimination in the furnishing of health services to handicapped infants. In fact, the AMA appears to concede (AMA Br. 42, 43) that Section 504 prohibits a federally assisted hospital from adopting a general policy of refusing to treat handicapped persons because of their handicaps. It argues

(AMA Br. 43-47), however, that a decision in an individual case to deny needed medical treatment to a handicapped infant solely because of his handicap—even where the parents have consented to such treatment—is beyond the reach of Section 504. And the AMA so argues even though it acknowledges (AMA Br. 46, 42) that such conduct would be "scandalous" and violate the law of all 50 states.

The AMA cites nothing—and there is nothing—in the text, legislative history, or purposes of Section 504 to support the AMA's proffered distinction between a discriminatory policy of refusing to furnish medical treatment to handicapped persons generally and a discriminatory refusal in an individual case. To the contrary, the AMA's argument flies in the face of the statutory language, which provides that "[n]o otherwise qualified *individual* * * * shall, solely by reason of *his* handicap * * * be denied the benefits of, or be subjected to discrimination" under a federally assisted program (emphasis added). The statute thus explicitly refers to individual acts of discrimination, not merely discriminatory policies of general application. See *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 414-418 (1978) (opinion of Stevens, J.); cf. *Connecticut* v. *Teal*, 457 U.S. 440, 453-456 (1982). Compare 45 C.F.R. 84.4 (b)(1) with *id.* 84.4(b)(4). It would be no solace to a handicapped individual who was denied treatment because of his own handicap to learn that the hospital does not have a broad policy of denying treatment to handicapped persons generally.[5] Accordingly, Section 504

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[5] Contrary to the AMA's assertion (AMA Br. 43), the example contained in the explanatory analysis of the Section 504 regulations promulgated in 1977 is not limited to general policies of exclusion (45 C.F.R. Pt. 84, App. A, para. 36 (emphasis added)):

> [A] burn treatment center need not provide other types of medical treatment to handicapped persons unless it provides such treatment to nonhandicapped persons. It could not, however, refuse to treat the burns of *a deaf person* because of his or her deafness.

See also 45 C.F.R. 84.53.

clearly prohibits a federally assisted hospital from refusing to furnish medical treatment to any particular handicapped infant, solely because of his handicap, where the parents have given their consent to the treatment.[6]

2. a. The AMA argues (AMA Br. 19-38), however, that Section 504 has no application where the parents have withheld their consent to treatment. The AMA first argues that because the Secretary acknowledges that Section 504 does not impose any duties on parents, since they are not recipients of federal financial assistance (J.A. 43, 122), the guidelines constitute an illegal attempt to accomplish indirectly what the Secretary cannot

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[6] The AMR argues (AMA Br. 39-41) that the guidelines and regulations are invalid under the Administrative Procedure Act, 5 U.S.C. 706(2)(A), to the extent they address a hospital's refusal to furnish treatment where the parents have consented to the treatment, because the Secretary did not establish as a factual matter that such refusals have occurred in the past. This argument is without merit for several reasons. First, although the AMA is correct in pointing out (AMA Br. 39 n.47) that it did include an APA count in its complaint, the AMA's objection in that count was limited to the asserted absence of a factual basis for the regulation insofar as it applies to situations in which the parents have *not* given their consent to treatment. See J.A. 146-147. The APA argument the AMA raises therefore is not properly before this Court.

Second, as the Secretary has explained (J.A. 34), the 1984 regulations did not establish the application of Section 504 to the discriminatory withholding of medical treatment from handicapped infants; that application already was established by Section 504 itself and the 1977 regulations. The principal feature of the measures adopted in 1984 was the interpretative guidelines, which merely explained the Secretary's construction of Section 504 in this setting. See 45 C.F.R. Pt. 84, App. C. Those guidelines imposed no new substantive duties on federally assisted hospitals. Compare *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 40-42 (1983). The Secretary need not establish a factual basis for the issuance of guidelines interpreting the statute. Cf. 5 U.S.C. 553(b)(B).

accomplish directly. See AMA Br. 19-24, 38. This argument is without merit.[7]

The Court has recognized that a state "is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." *Parham* v. *J.R.*, 442 U.S. 584, 603 (1979); see also *Santosky* v. *Kramer*, 455 U.S. 745 (1982). Accordingly, as the AMA concedes (AMA Br. 3-4, 25), the law of all 50 states provides for the overriding of the parents' withholding of consent to medical treatment in some circumstances and permits (indeed requires) a hospital to take steps to facilitate such state intervention in appropriate circumstances—*e.g.*, by reporting the matter to the responsible state agency or instituting its own judicial action in state court. See Pet. Br. 28 n.17. Section 504 simply requires that the hospital act in a nondiscriminatory manner in response to the parents' action by taking such steps for the protection of a handicapped child if it would do so in similar circumstances for a nonhandicapped child. Nor does Section 504 affirmatively prohibit the Secretary from taking steps that may have

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[7] Contrary to the AMA's assertion (AMA Br. 7-10), the Secretary made clear from the outset that Section 504 does not authorize the regulation of parents' decisions concerning the treatment of their children. See 47 Fed. Reg. 26027 (1982) (J.A. 127-128). Moreover, and again contrary to the AMA's assertion (AMA Br. 21-23, 38), there is no inconsistency between that position and the Secretary's bringing of the action against the hospital in the *University Hospital* case to obtain access to the hospital's records pertaining to Baby Jane Doe. Without access to those records, HHS could not determine whether the *hospital* had engaged in discrimination on the basis of handicap in its response to the parents' withholding of consent to treatment. The AMA also errs in asserting that the requirement that the hospital post a notice "is unquestionably aimed at parents" (AMA Br. 23). The Secretary modified this requirement for the express purpose of permitting it to be posted where it would not be conspicuous to parents but would be conspicuous to hospital personnel (J.A. 25).

an effect on parental decisions, because there is no congressional policy in Section 504 to afford absolute deference to those decisions.[8] Section 504 simply does not address parents' decisions as such, because parents are not recipients of federal financial assistance within the meaning of the statute. Moreover, if the hospital takes appropriate steps in response to the parents' withholding of consent, it is the state law processes the hospital invokes, not Section 504, that overrides the parents' wishes.

b. The AMA also argues (AMA Br. 24-38) that, in order to avoid the need for the Secretary to make state-law determinations, no violation of Section 504 may be found in parental non-consent situations in the absence of a prior determination by state authorities that the hospital has violated its duties under state law to report suspected incidents of medical neglect by parents. Contrary to the AMA's contention (AMA Br. 25-27), however, a violation of Section 504 in these circumstances is not dependent upon a finding of a violation by the hospital of a state-law reporting duty. The Secretary's guidelines provide that where the parents have withheld their consent, the hospital still must operate all aspects of its health care programs in a manner consistent with Section 504. The guidelines then state (J.A. 122 (emphasis added)):

> Such aspects include[] decisions on whether to report, as required by State law *or otherwise*, to the appropriate child protective services agency a suspected instance of medical neglect of a child, or to take other action [*e.g.*, filing its own judicial action] to seek review [of] parental decisions to withhold consent for medically indicated treatment.

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[8] Again, an analogy to Title VI is instructive. Although a parent might want his child to be placed in a racially segregated classroom or to be treated differently because of his race, Title VI clearly would prohibit a school district that receives federal financial assistance from complying with the parent's wishes. Similarly here, the parents' wishes do not relieve the hospital from its duty to conduct its affairs in a non-discriminatory manner.

The emphasized words, which the AMA conspicuously omits in its quotation of the guidelines (AMA Br. 26), make clear that the guidelines prohibit discrimination in the hospital's response to a parental withholding of consent, whether or not the hospital's actions also violate state law. For example, Section 504 requires evenhanded treatment of a handicapped person in the application of the hospital's own internal policies and procedures that are to be followed in the case of the refusal by parents to consent to necessary treatment for their child.[9]

The result is no different, however, where the hospital's failure to report the matter to the state agency or to file a judicial action does violate state law. There are many situations in which state law forms a backdrop for the actions of an entity (*e.g.*, a school district or police department) that is subject to the nondiscrimination requirements of the federal civil rights laws. It has never been thought that federal officials are disabled from investigating allegations of discrimination in the operation of such entity unless and until state authorities have determined that the conduct in question also violated state law. The federal interest is not in the violation of state law as such, but in the distinct violation of federal law resulting from the hospital's discriminatory conduct.

Of course, if HHS learns of a situation in which a hospital failed to notify the responsible agency or take other customary action where the parents have withheld their consent to treatment, it may be appropriate in many circumstances for HHS to notify the responsible state agency and to defer in the first instance to the state agency, which can determine whether the parents' withholding of consent constituted child neglect or whether a

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[9] The AMA also relies on 45 C.F.R. 84.55(c). See AMA Br. 25-26, 30 n.37. However, that provision does not address the responsibilities of hospitals under Section 504. It concerns the distinct responsibilities of a state child protective services agency that receives federal funds to utilize its authority under state law to investigate instances of medical neglect of handicapped infants.

hospital's failure to report the incident violated a state law duty. See 48 Fed. Reg. 30849 (1983). When the regulations implementing the Child Abuse Amendments of 1984 were promulgated, the Secretary stressed that if this Court holds that Section 504 applies to the withholding of medical treatment from handicapped infants, steps will be taken to ensure that the requirements under the 1984 Amendments that state agencies investigate the withholding of medical treatment from handicapped infants will be "fully coordinated" with the implementation of Section 504 (50 Fed. Reg. 14885 (1985)).[10]

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JANUARY 1986

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[10] Although both the AMA and AHA assert that HHS investigations have been disruptive (AMA Br. 33-34; AHA Br. 7-10, 27-28), the Secretary refuted those assertions when the regulations were promulgated (J.A. 80-86). The Secretary also prescribed guidelines to minimize the number of on-site investigations and to ensure that future federal investigations will be conducted with the least disruption possible. 45 C.F.R. Pt. 84, App. C, subpt. (b). See J.A. 46-56. Any remaining issues regarding the manner in which such investigations are conducted should be resolved on a case-by-case basis, if and when they arise.

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